

§ 1954.2 Monitoring system.

(a) To carry out the responsibilities for continuing evaluation of State plans under section 18(f) of the Act, the Assistant Secretary has established a State Program Performance Monitoring System. Evaluation under this monitoring system encompasses both the period before and after a determination has been made under section 18(e) of the Act. The monitoring system is a three phased system designed to assure not only that developmental steps are completed and that the operational plan is, in fact, at least as effective as the Federal program with respect to standards and enforcement, but also to provide a method for continuing review of the implementation of the plan and any modifications thereto to assure compliance with the provisions of the plan during the time the State participates in the cooperative Federal-State program.

(b) Phase I of the system begins with the initial approval of a State plan and continues until the determination required by section 18(e) of the Act is made. During Phase I, the Assistant Secretary will secure monitoring data to make the following key decisions:

- (1) What should be the level of Federal enforcement;
- (2) Should plan approval be continued; and
- (3) What level of technical assistance is needed by the State to enable it to have an effective program.

(c) Phase II of the system relates to the determination required by section 18(e) of the Act. The Assistant Secretary must decide, after no less than three years following approval of the plan, whether or not to relinquish Federal authority to the State for issues covered by the occupational safety and health program in the State plan. Phase II will be a comprehensive evaluation of the total State program, drawing upon all information collected during Phase I.

(d) Phase III of the system begins after an affirmative determination has been made under section 18(e) of the Act. The continuing evaluation responsibility will be exercised under Phase III, and will provide data concerning the total operations of a State program to enable the Assistant Secretary to

determine whether or not the plan approval should be continued or withdrawn.

(e) The State program performance monitoring system provides for, but is not limited to, the following major data inputs:

- (1) Quarterly and annual reports of State program activity;
- (2) Visits to State agencies;
- (3) On-the-job evaluation of State compliance officers; and
- (4) Investigation of complaints about State program administration.

§ 1954.3 Exercise of Federal discretionary authority.

(a)(1) When a State plan is approved under section 18(c) of the Act, Federal authority for enforcement of standards continues in accordance with section 18(e) of the Act. That section prescribes a period of concurrent Federal-State enforcement authority which must last for at least three years, after which time the Assistant Secretary shall make a determination whether, based on actual operations, the State plan meets all the criteria set forth in section 18(c) of the Act and the implementing regulations in 29 CFR part 1902 and subpart A of 29 CFR part 1952. During this period of concurrent authority, the Assistant Secretary may, but shall not be required to, exercise his authority under sections 5(a)(2), 8, 9, 10, 13 and 17 of the Act with respect to standards promulgated under section 6 of the Act where the State has comparable standards. Accordingly, section 18(e) authorizes, but does not require, the Assistant Secretary to exercise his discretionary enforcement authority over all the issues covered by a State plan for the entire 18(e) period.

(2) Existing regulations at 29 CFR part 1902 set forth factors to be considered in determining how Federal enforcement authority should be exercised. These factors include:

- (i) Whether the plan is developmental or complete;
- (ii) Results of evaluations conducted by the Assistant Secretary;
- (iii) The State's schedule for meeting Federal standards; and
- (iv) Any other relevant matters.

(29 CFR 1902.1(c)(2) and 1902.20(b)(1)(iii).

(3) Other relevant matters requiring consideration in the decision as to the level of Federal enforcement include:

(i) Coordinated utilization of Federal and State resources to provide effective worker protection throughout the Nation;

(ii) Necessity for clarifying the rights and responsibilities of employers and employees with respect to Federal and State authority;

(iii) Increasing responsibility for administration and enforcement by States under an approved plan for evaluation of their effectiveness; and

(iv) The need to react promptly to any failure of the States in providing effective enforcement of standards.

(b) *Guidelines for determining the appropriate level of Federal enforcement.* In light of the requirements of 29 CFR part 1902 as well as the factors mentioned in paragraph (a)(3) of this section, the following guidelines for the extent of the exercise of discretionary Federal authority have been determined to be reasonable and appropriate. When a State plan meets all of these guidelines it will be considered operational, and the State will conduct all enforcement activity including inspections in response to employee complaints, in all issues where the State is operational. Federal enforcement activity will be reduced accordingly and the emphasis will be placed on monitoring State activity in accordance with the provisions of this part.

(1) *Enabling legislation.* A State with an approved plan must have enacted enabling legislation substantially in conformance with the requirements of section 18(c) and 29 CFR part 1902 in order to be considered operational. This legislation must have been reviewed and approved under 29 CFR part 1902. States without such legislation, or where State legislation as enacted requires substantial amendments to meet the requirements of 29 CFR part 1902, will not be considered operational.

(2) *Approved State standards.* The State must have standards promulgated under State law which standards are the same as Federal standards; have been found to be at least as effective as the comparable Federal standards; or have been reviewed by the Assistant Regional Director under the

delegation of authority in 29 CFR 1953.4 and found to provide overall protection equal to comparable Federal standards. Review of the effectiveness of State standards and their enforcement will be a continuing function of the evaluation process. Where State standards in an issue have not been promulgated by the State or have been promulgated and found not to provide overall protection equal to comparable Federal standards, the State will not be considered operational as to those issues.

(3) *Personnel.* The State must have a sufficient number of qualified personnel who are enforcing the standards in accordance with the State's enabling legislation. Where a State lacks the qualified personnel to enforce in a particular issue; e.g., Occupational Health, the State will not be considered operational as to that issue even though it has enabling legislation and standards.

(4) *Review of enforcement actions.* Provisions for review of State citations and penalties, including the appointment of the reviewing authority and the promulgation of implementing regulations, must be in effect.

(c)(1) *Evaluation reports.* One of the factors to consider in determining the level of Federal enforcement is the result of evaluations conducted under the monitoring system described in this part. While completion of an initial comprehensive evaluation of State operations is not generally a prerequisite for a determination that a State is operational under paragraph (b) of this section, such evaluations will be used in determining the Federal enforcement responsibility in certain circumstances.

(2) Where evaluations have been completed prior to the time a determination as to the operational status of a State plan is made, the results of those evaluations will be included in the determination.

(3) Where the results of one or more evaluations conducted during the operation of a State plan and prior to an 18(e) determination reveal that actual operations as to one or more aspects of the plan fail in a substantial manner to be at least as effective as the Federal program, and the State does not adequately resolve the deficiencies in accordance with subpart C of part 1953,

the appropriate level of Federal enforcement activity shall be reinstated. An example of such deficiency would be a finding that State standards and their enforcement in an issue are not at least as effective as comparable Federal standards and their enforcement. Federal enforcement activity may also be reinstated where the Assistant Secretary determines that such action is necessary to assure occupational safety and health protection to employees.

(d)(1) *Recognition of State procedures.* In order to resolve potential conflicting responsibilities of employers and employees, Federal authority will be exercised in a manner designed to recognize the implementation of State procedures in accordance with approved plans in areas such as variances, informing employees of their rights and obligations, and recordkeeping and reporting requirements.

(i) Subject to pertinent findings of effectiveness under this part, Federal enforcement proceedings will not be initiated where an employer is in compliance with a State standard which has been found to be at least as effective as the comparable Federal standard, or with any temporary or permanent variance granted to such employer with regard to the employment or place of employment from such State standard, or any order or interim order in connection therewith, or any modification or extension thereof; *Provided* such variance action was taken under the terms and procedures required under § 1902.4(b)(2)(iv) of this chapter, and the employer has certified that he has not filed for such variance on the same set of facts with the Assistant Secretary.

(ii) Subject to pertinent findings of effectiveness under this part, and approval under subparts B and F of part 1953, Federal enforcement proceedings will not be initiated where an employer has posted the approved State poster in accordance with the applicable provisions of an approved State plan and § 1952.10 of this chapter.

(iii) Subject to pertinent findings of effectiveness under this part, and approval under subparts B and F of part 1953, Federal enforcement proceedings will not be initiated where an employer is in compliance with the record-

keeping and reporting requirements of an approved State plan as provided in § 1952.4 of this chapter.

(2) [Reserved]

(e) *Discrimination complaints.* State plan provisions on employee discrimination do not divest the Secretary of Labor of any authority under section 11(c) of the Act. The Federal authority to investigate discrimination complaints exists even after an affirmative 18(e) determination. (See South Carolina decision 37 FR 25932, December 6, 1972). Employee complaints alleging discrimination under section 11(c) of the Act will be subject to Federal jurisdiction.

(f)(1) *Procedural agreements.* A determination as to the operational status of a State plan shall be accompanied by an agreement with the State setting forth the Federal-State responsibilities as follows:

(i) Scope of the State's operational status including the issues excluded from the plan, the issues where State enforcement will not be operational at the time of the agreement and the dates for commencement of operations;

(ii) Procedures for referral, investigation and enforcement of employee requests for inspections;

(iii) Procedures for reporting fatalities and catastrophes by the agency which has received the report to the responsible enforcing authority both where the State has and has not adopted the requirement that employers report as provided in 29 CFR 1904.8;

(iv) Specifications as to when and by what means the operational guidelines of this section were met; and

(v) Provision for resumption of Federal enforcement activity for failure to substantially comply with this agreement, or as a result of evaluation or other relevant factors.

(2) Upon approval of these agreements, the Assistant Secretary shall cause to be published in the FEDERAL REGISTER, notice of the operational status of each approved State plan.

(3) Where subsequent changes in the level of Federal enforcement are made, similar FEDERAL REGISTER notices shall be published.

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